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No. 00-547

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

KATHERINE T. WALLACE,

Petitioner,

v.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

JANET L. GOETZ
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Attorney for Respondents Skadden Arps, Slate, Meagher & Flom LLP; Thomas J. Schwarz; Antoinette Cook Bush; Henry P. Baer; Robert S. Lighthizer; John J. Mangan; Neal S. McCoy; Janet L. Goetz; Richard L. Brusca; Richard A. Hindman; Ellen Lyons

E. LAWRENCE BARCELLA, JR.
Counsel of Record
NEAL D. MOLLEN
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 508-9500

Attorney for Respondents Paul, Hastings, Janofsky & Walker LLP; Barbara Berish Brown; Ellen C. Rice; W. Glenn Merten; David Scott Nance; William F. Gould; Linda L. Rickman; John J. Burke; Thomas J. Casey; Tracey DeVaux; Abbey G. Hairston

(Additional Counsel listed on signature page)

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QUESTIONS PRESENTED

1. Is the Superior Court of the District of Columbia a "court of the United States" for purposes of 18 U.S.C. §§ 1503 and 1512?

2. Must a court assume the truth of bald assertions of law made in a complaint in addressing a motion to dismiss for failure to state a claim?

3. Respondents' counsel spoke on the telephone with the law clerk for the district judge in this case to determine whether an order had been entered. Did this telephone call constitute misconduct, or create the appearance of impropriety, by the district judge, requiring recusal under 28 U.S.C. § 455(a)?

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BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT

1. Petitioner Katherine T. Wallace was an associate with the law firm of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden, Arps" or the "Firm") from 1993 until 1995, when her employment was terminated. Following her termination, she filed a defamation and wrongful discharge complaint against the Firm and several of its lawyers in the Superior Court for the District of Columbia seeking $50 million in damages. The defendants in that lawsuit recently obtained summary judgment on all counts. Petitioner has appealed the judgment to the District of Columbia Court of Appeals.

Petitioner subsequently filed a second lawsuit in Superior Court, this one alleging that Skadden, Arps and its lawyers had discriminated against her because of her marital status (she is married with children) and her race (she is African American). In this second suit, she sought $85 million. The defendants in that case obtained summary judgment as well on all counts, and petitioner has also appealed this case to the District of Columbia Court of Appeals.

2. During the course of litigating the Superior Court cases, petitioner deposed a number of lawyers and administrative staff members who previously had worked at Skadden, Arps. Because these former employees became involved in the litigation only as a result of their employment at Skadden, Arps, the Firm offered to pay for legal representation — either by the lawyers then representing the

Firm, or by lawyers chosen individually by each witness. Of 10 former-employee witnesses, five chose to be represented by the attorneys then representing the defendants in those cases, three selected counsel of their own (whom the Firm then paid), and two chose to be unrepresented.

3. Skadden, Arps' offer to pay for the lawyers representing its former employees is the *sole* alleged basis for this lawsuit. Petitioner claims that when Skadden, Arps agreed to pay for the legal representation of its former employees, it committed bribery, witness tampering, obstruction of justice and, cumulatively, racketeering activity in violation of the Racketeering Influenced and Corrupt Organizations Act of 1970 ("RICO"), 18 U.S.C. §§ 1964(c), (d). Petitioner has sued seven witnesses who accepted Skadden, Arps' offer (whether or not they were represented by Skadden, Arps' lawyers); each of the lawyers who represented any one of these deponents (partners in a number of other firms); many others (including junior associates) who were only tangentially involved in the representations; and all of the law firms in which those lawyers work (collectively referred to in this brief as "respondents"). She sought $360 million for these purported RICO violations. Pet. App. A70.

4. For all of its 40 pages, 52 Counts, and 170 numbered paragraphs, petitioner's Amended Complaint never alleged a single fact indicating that the Firm's offer influenced — or was intended to influence — the substance of the testimony given by the deponents. Specifically, petitioner did not, and could not, claim that Skadden, Arps interfered or attempted to interfere with the attorney-client relationship existing between these former employees and their various counsel. Petitioner did not allege that this representation was

compromised in any respect by the offer made by Skadden, Arps. Moreover, petitioner did not, and could not, allege (1) that Skadden Arps conditioned the payment of legal fees on any deponent's willingness to testify in any particular manner, or even to testify at all; (2) that any one of the deponents lied during any of these depositions, much less that the fee arrangement offer was contingent on such a lie; or (3) that any one of the respondents supplied any deponent with an answer to any question, much less that the fee arrangement was offered as a *quid pro quo* for the witness' willingness to give such an answer.

5. In the absence of any such allegations (and for other reasons), the district court dismissed the Amended Complaint. The court observed that the conduct alleged in the complaint is commonplace — indeed, employers in many states and in a variety of contexts are compelled by statute to offer employees reimbursement for business-related legal expenses. Accordingly, the court concluded that as a matter of law, it is not unlawful for an employer to offer to pay for legal services rendered to a former employee, absent facts that suggest that the reimbursement offer was made "corruptly" with the hope of directing the content of that testimony. The court also observed that while petitioner's complaint had parroted the language of the relevant statutes — alleging respondents' "corrupt" intent to "influence" testimony — the complaint did not allege the necessary factual predicates for the claim.

6. The court of appeals affirmed in a unanimous unpublished order. Acknowledging that a complaint need not be pled with evidentiary detail, the court held that "where plaintiff makes clear that the allegations rest on specific facts that do not suffice, and no other set of facts, grant of a motion

under Rule 12(b)(6) is appropriate." Pet. App. A2. Affirming "substantially" for the reasons stated by the district court, the court of appeals concluded an employer does not engage in bribery, witness tampering, or obstruction of justice merely by indicating its willingness to pay for a lawyer to represent its employees or former employees in litigation arising from the employment relationship.

7. On the day the respondents filed their motion to dismiss petitioner's Amended Complaint, petitioner filed a motion for partial summary judgment. Petitioner's motion and its attachments totaled nearly 400 pages. Because petitioner's accusations of bribery, obstruction of justice, and witness tampering were so evidently frivolous, respondents reasonably sought to forestall the expense of answering petitioner's motion for partial summary judgment until the district court had resolved the pending motion to dismiss. Accordingly, respondents filed a motion to stay consideration of the summary judgment motion until the motion to dismiss had been decided.

In the absence of relief from the district court, the respondents' opposition to the summary judgment motion would have been due on Monday, September 21, 1998. Accordingly, when respondents had not received any decision on their stay motion by the afternoon of Wednesday, September 16, counsel for respondents called the chambers of the district judge to ask the judge's law clerk whether the motion had been decided, and if not, to inquire as to whether a decision might be expected before the opposition would be due. Counsel did not have any communication with the district judge, and did not discuss the merits of the motion for a stay — or any other matter — with the law clerk during this conversation.

Later that same day, the court faxed an order to respondents. The order did not grant respondents' motion for a stay. It did, however, indicate that the respondents were not obligated to file a response to the motion for partial summary judgment until the court addressed the motion to stay on the merits.[1]

8. On the basis of these facts, the district judge became the latest victim of petitioner's personal attacks. Because respondents' billing records — submitted in support of sanctions that had already been imposed on petitioner by the district court[2] — reflected the conversation between respondents' counsel and the judge's law clerk, petitioner accused the judge of succumbing to alleged *ex parte* persuasion by respondents' counsel. The court of appeals found no impropriety in respondents' limited contacts with chambers. Pet. App. A4. Neither did it find any evidence of judicial bias. *Id.*

The accusation represents the latest step in petitioner's continuing, vindictive attempt to vilify anyone and everyone with the temerity to oppose or disagree with her:

- After receiving an adverse ruling on a discovery matter, petitioner accused a judge of the Superior

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1. For the Court's convenience, copies of the relevant Superior Court papers have been lodged with the Office of the Clerk of this Court rather than appended to this brief. The Court is entitled to take judicial notice of these materials. *Papasan v. Allain*, 478 U.S. 265, 267 & n.1 (1986) (Court may take judicial notice "of items in the public record").

2. Because petitioner's claims were so clearly baseless, and so clearly animated by bad faith, respondents sought sanctions under 28 U.S.C. § 1927. Petitioner did not respond to the sanctions request, and the district court awarded sanctions. Pet. App. A12-A13.

Court, who was then presiding over one of her lawsuits, of "bias and prejudice" against petitioner and "bias[] in favor of [respondents] and their counsel, all law firms. . . ." She accused the judge of "accord[ing] an unfair advantage to [respondents] and their counsel" all because the judge indicated to petitioner in open court that, as a practicing attorney, petitioner would be given no special consideration because of her *pro se* status;

- Petitioner accused a lawyer defending Skadden, Arps in the first of her Superior Court lawsuits of unethical conduct, and sought to have her sanctioned, for an assertedly improper use of an ellipsis;

- In yet another sanctions motion, petitioner accused Skadden, Arps, and each of the lawyers representing the Firm (including very junior associates), of "illegal and unethical behavior" for issuing two subpoenas which, petitioner contended, were defective because the recipients were beyond the Superior Court's 25-mile subpoena power.

9. Petitioner sought rehearing and suggested rehearing *en banc*. Both the petition and the suggestion were denied. This petition followed.

REASONS FOR DENYING THE PETITION

1. Petitioner seeks review on the question whether the Superior Court of the District of Columbia is a "court of the United States" for purposes of 18 U.S.C. §§ 1503 and 1512. That question possesses none of the qualities that ordinarily make a question worthy of a grant of certiorari. Sup. Ct. R. 10.

First, the question was not necessary to the judgment below, and accordingly was not directly addressed in the order of the court of appeals in this case.[3] That order, then, could not conflict with any decision of this Court. Second, as petitioner correctly points out (Pet. 7, 14), the question is one of first impression in any appellate court. Moreover, because the question has never been confronted by a single appellate court, by definition, the question is not the sort of recurring question of federal law that would merit review by this Court. Under these circumstances, it is simply not possible to maintain that "compelling reasons" exist for a grant for certiorari. Sup. Ct. R. 10.

Finally, the district court — which reached the issue as an alternative basis for its decision — was correct in concluding that the Superior Court is not a "court of the United States." That decision is consistent with the handful of district court decisions on point, and in defining that phrase in other contexts, Congress has twice indicated that the phrase does not include the Superior Court.

2. Petitioner contends that the court of appeals misapplied the standards for considering a motion to dismiss. Petitioner is incorrect; the court identified the settled and unchallenged legal standard and applied it correctly to petitioner's complaint. The court of appeals simply determined that, as a matter of law, an employer does not engage in racketeering activity — bribery, witness tampering,

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3. The court of appeals did indicate that it was affirming "substantially for the reasons" given by the district court, and the district court concluded that the Superior Court was not a "court of the United States." Because the district court provided alternate grounds for its decision to dismiss the Complaint, however, the court of appeals' position on this subsidiary question is unclear.

or obstruction of justice — when it offers to pay the legal bills of employees drawn into litigation solely as a result of their work activities. That is all petitioner's complaint alleged, and the court's legal conclusions were both correct and entirely unremarkable.

But even if the court of appeals mistakenly applied the settled rules applicable to these motions — and it plainly did not — no question worthy of certiorari would be posed by that error. The court of appeals identified the legal standard applied universally in the courts of appeals, and applied that standard to the bizarre and highly idiosyncratic allegations of petitioner's complaint. Correcting any perceived error in the precise way in which the court parsed the language of the complaint in this case would not decide an important question of federal law or correct such a "depart[ure] [by the court of appeals] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

3. Petitioner contends that a judge is obligated to recuse herself under 28 U.S.C. § 455(a) if her law clerk takes a telephone call from counsel for a litigant regarding the administrative status of a motion in a pending case. Petitioner cites no law for this extraordinary proposition, posits no inter-circuit conflict, no divergence from the opinions of this Court, and no compelling reasons for a grant of certiorari. Petitioner feels aggrieved by the district court's action, but that action did not prejudice her in any way, was entirely consistent with controlling legal and ethical standards, and presents no colorable basis for review.

I. NONE OF THIS COURT'S STANDARDS FOR GRANTING REVIEW IS MET WITH RESPECT TO THE QUESTION WHETHER THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA IS A "COURT OF THE UNITED STATES"

Petitioner argues that the Court should grant review in this case to determine whether the Superior Court of the District of Columbia is a "court of the United States" within the meaning of two federal criminal statutes. Petitioner claims that certiorari is warranted "because the question [has] never [been] decided by any court of appeals and because the D.C. Circuit declined to issue an opinion in the proceedings below. . . ." Pet. 7.

In articulating her argument for review, petitioner has convincingly established that review is not warranted. As the Court has explained, a writ of certiorari issues "only for compelling reasons." Sup. Ct. R. 10. Typically, review is granted to permit the Court "to clarify a recurring question of [federal] law that has been the subject of considerable disagreement." *Commissioner v. Soliman*, 506 U.S. 168, 184 (1993) (Thomas, J., concurring),[4] or when the court below has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

As petitioner concedes, these conditions are not present here. This Court has never decided the question. The court of appeals did not discuss the question and the question was not necessary to its resolution of the appeal; therefore the

4. *See also Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979 (1994) (Thomas, J., dissenting from the denial of certiorari) ("confusion on an important and recurring question of federal law provides sufficient reason to grant certiorari").

judgment below cannot conflict with any holding of this Court. No court of appeals has ever reached the question before; therefore there can be no division of appellate authority on the question. In fact, the court of appeals in this case did not independently analyze the question presented, and issued no opinion on the subject. If no appellate court has *ever* been forced to grapple with the issue in the entire history of the Superior Court, it is difficult to imagine a "compelling reason" for this Court to become the first.[5]

Moreover, even if there were a raging controversy on the status of the Superior Court, this case would provide a poor vehicle to decide the question. The central holding of the district court's opinion was that petitioner's complaint failed to state a cause of action because the conduct she alleged — an employer's reimbursement of legal fees incurred by its employees in business-related litigation — would violate none of the statutes on which her claim relied. Thus, even if the Court were to grant review on the narrow legal question regarding the Superior Court's status, it would have no effect whatever on the disposition of the case. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("[r]esolution . . . [of the question posed] can await a day when the issue is posed less abstractly").

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5. *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied where issue requires "further study" in the lower courts "before it is addressed by this Court"); *accord Gilliard v. Mississippi*, 464 U.S. 867, 869 (1983) (reflecting view of court that Court should "postpone consideration of the issue [presented] until more state supreme courts and federal circuits have experimented with . . . solutions to the problem").

Finally, the district court plainly answered the question correctly. Three other district court decisions address the question, and in all three, the courts have concluded that the Superior Court was not a "court of the United States" for these purposes.[6] When the question has arisen in other contexts, courts have regularly agreed that the District of Columbia local courts are not "courts of the United States,"[7] and the lower courts have repeatedly reached the same conclusion as to other Article I courts.[8]

Moreover, the Federal Rules of Criminal Procedure — the rules governing federal prosecutions arising under §§ 1503 and 1512 — apply "in the courts of the United

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6. *United States v. Smith*, 729 F. Supp. 1380 (D.D.C. 1990); *United States v. Allen*, 729 F. Supp. 120 (D.D.C. 1989); *United States v. Regina*, 504 F. Supp. 629 (D. Md. 1980).

7. *See, e.g., Christian v. United States*, 394 A.2d 1, 44 & n.105 (D.C. 1978) (recognizing that "the Superior Court is not a 'court of the United States,' as defined by 28 U.S.C. § 451"); *Dillard v. Yeldell*, 334 A.2d 578, 580 (D.C. 1975) ("this court is not a 'court of the United States' as defined in 28 U.S.C. § 451"); *Burke v. United States*, 103 A.2d 347, 349 (D.C. 1954) (Juvenile Court of the District of Columbia is not a "court of the United States").

8. *See, e.g., United States v. George*, 625 F.2d 1081, 1088-89 (3d Cir. 1980) (§ 1503 case; federal district court for the Virgin Islands is not a "court of the United States"; "[t]he fact that its judges do not hold office during good behavior and that the court is thus excluded from the definition of 'court of the United States' which is contained in 28 U.S.C. § 451 is confirmatory of this"); *United States v. Ford*, 641 F. Supp. 704 (D.S.C. 1986) (§ 1503 case; military courts-martial are not "courts of the United States"), *aff'd mem.*, 816 F.2d 674 (4th Cir. 1987); *United States v. Bell*, 108 F. Supp. 777, 778 (D. Alaska 1952) (§ 1503 case; District Court of Territory of Alaska is not a "court of the United States").

States." The term is defined to include "the United States District Courts . . . the United States Courts of Appeals, the Supreme Court of the United States" — *i.e.*, federal Article III courts — and specifically enumerated territorial courts.[9] Fed. R. Crim. P. 1, 54(a). As defined, however, the term does *not* include the Superior Court. Similarly, the Judiciary Code defines the phrase "court of the United States" to include "the Supreme Court of the United States, [the federal] courts of appeals, [federal] district courts . . . and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior." 28 U.S.C. § 451. Superior Court judges serve a term of fifteen years, and thus the definition does not extend to them. *See* D.C. Code § 11-1502 (2000).

In sum, there are no "compelling reasons" to grant review in this case and no reason to suppose that the courts below answered this question incorrectly. Review should be denied.

II. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARDS TO RESPONDENTS' MOTION TO DISMISS AND CORRECTLY CONSTRUED PETITIONER'S COMPLAINT

Petitioner also attacks the manner in which the courts below construed her complaint. Petitioner suggests that the court improperly expected her complaint to contain a level of detail she was not obligated to plead. Although she casts her disagreement as a dispute over legal standards, petitioner's grievance goes to the application — or alleged misapplication — of settled legal principles. Petitioner

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9. These include, for example, District Courts in the Northern Mariana Islands and Guam. Fed. R. Crim. P. 54(a).

identifies no error made by the courts below on an important question of federal law, no division of authority among the courts of appeals, and no compelling reasons for review, as explained in section A. Petitioner argues not that the courts below adopted a controversial legal standard, but that they misapplied the accepted legal standard to the peculiarities of her complaint. This contention is demonstrably false, as explained in section B below, but even if this were true, this Court "does not sit primarily to correct what [it] perceive[s] to be mistakes committed by other tribunals." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring).

A. THE COURTS BELOW IDENTIFIED AND APPLIED THE CORRECT LEGAL STANDARD

The standards for considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6) are settled and uncontroversial: (1) the complaint's *factual* allegations must be taken as true[10]; (2) but the court is "not bound to accept as true a legal conclusion couched as a factual allegation,"[11] take as true "opprobrious epithets"[12] contained in the complaint, or draw inferences in the plaintiff's favor that are not warranted by the complaint's factual allegations[13]; and (3) when "plaintiff makes clear that the allegations rest on specific facts that do not suffice, and no other set of facts, grant of a motion

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10. Pet. App. A2, A6-7; *Papasan*, 478 U.S. at 286.

11. *Papasan*, 478 U.S. at 286.

12. *Snowden v. Hughes*, 321 U.S. 1, 10 (1944).

13. Pet. App. A7.

[to dismiss] is appropriate."[14] As the First Circuit has explained, "the price of entry, even to discovery, is for the plaintiff to allege a *factual* predicate concrete enough to warrant further proceedings, which may be costly and burdensome. Conclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55-56 (1st Cir. 1999).

Those were precisely the standards recited and then applied by the courts below. After concluding, as a matter of law, that it is not *per se* unlawful for an employer to offer to reimburse its employees (or former employees) for incurred legal expenses — a proposition of law on which petitioner does *not* seek certiorari — both courts below searched the complaint for some further factual allegations of wrongdoing that might state a claim entitling petitioner to recover. There are none. Petitioner alleged, for example, that Skadden, Arps offered to reimburse deponents for legal representation "corruptly" and "with the intent of influencing [the deponents'] testimony," Pet. App. A38, but that language, lifted directly from the text of 18 U.S.C. § 201, is no more than "a legal conclusion couched as a factual allegation." *Papasan*, 478 U.S. at 286 (plaintiffs' allegation that they had been denied "a minimally adequate education" was a legal conclusion, not an allegation of fact binding on the district court in considering a motion to dismiss).

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14. Pet. App. A2; *Papasan*, 478 U.S. at 267 n.1 (motion to dismiss is appropriate mechanism to resolve dispute where "[t]he historical facts . . . are not disputed by the parties, . . . the parties disagree only on the legal significance of the facts"); *see also Chongris v. Board of Appeals*, 811 F.2d 36, 37 (1st Cir.) (court must construe facts alleged in plaintiff's favor "exempt[ing], of course, those 'facts' which have been conclusively contradicted by [plaintiff's] concessions"), *cert. denied*, 483 U.S. 1021 (1987).

Thus, the district court determined that the *factual* allegations in petitioner's complaint were insufficient to state a claim, and that her "corrupt intent" and "intent to influence testimony" assertions were merely vague legal conclusions the court was not obliged to accept as true. The court of appeals agreed. Both courts applied standards adopted by this Court and utilized in every circuit.[15] Petitioner plainly believes (incorrectly) that the courts below erred and that these assertions should have been treated as allegations of fact rather than assertions of law. That claim, however, raises questions about the application of settled legal standards to the peculiarities of petitioner's complaint, not the sort of unsettled issue of federal law for which the Court ordinarily reserves review.

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15. *See, e.g.*, *Papasan*, 478 U.S. at 286; *see also DM Research*, 170 F.3d at 55-56 (rule of lenity in construction of complaint does not extend to bald assertions, subjective characterizations, and legal conclusions); *Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) ("[w]hile the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice"); *Bender v. Suburban Hosp.*, 159 F.3d 186, 192 (4th Cir. 1998) (court entitled to ignore plaintiff's labels and conclusions and address solely the factual allegations of the complaint); *Frey v. City of Herculaneum*, 44 F.3d 667, 671 (8th Cir. 1995) ("[a]t the very least, however, the complaint must contain facts which state a claim as a matter of law and must not be conclusory"); *Halkin v. VeriFone Inc.*, 11 F.3d 865, 868 (9th Cir. 1993) ("[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss"); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) ("conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based").

B. THE COURTS BELOW CORRECTLY APPLIED SETTLED LEGAL PRINCIPLES TO THE CONCLUSORY ALLEGATIONS AND LEGAL ASSERTIONS OF PETITIONER'S COMPLAINT

Although no "compelling reason" exists for this Court to review the highly individualized application of these well-established rules to petitioner's complaint, were it to do so, it would find that the courts below were entirely correct.

First, although petitioner does not seek certiorari on the point,[16] the courts below were plainly correct in concluding that it is not unlawful *per se* for an employer to offer to reimburse the legal expenses incurred by an employee in business-related litigation.[17] In some states, indemnification is compelled by statute, for example, when the employee is actually sued or for any expenses of business-related litigation in which the employee is involved.[18] Indeed,

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16. *Irvine v. California*, 347 U.S. 128, 129 (1954) (consideration limited to questions listed in "Questions Presented").

17. Petitioner suggests that there is a conflict between the decision below and *Hamilton v. General Motors Corp.*, 490 F.2d 223, 228 (7th Cir. 1973), but that case supports the decision below. In *Hamilton*, the court declined to enforce an implied contract to compensate a fact witness for time spent preparing to testify and in giving testimony. The witness, however, was reimbursed for out-of-pocket expenses associated with his testimony, which the court did not disturb. In this case, the deponents were not paid any compensation. They were simply reimbursed for their legal expenses.

18. *See, e.g.*, Cal. Lab. Code § 2802 (2000) (requiring employer to "indemnify" any employee "for all that employee necessarily expends or loses" in litigation related to the employee's

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indemnification of expenses is expressly permitted by the rules of professional conduct in the District of Columbia, where the allegedly unlawful conduct occurred. *See* D.C. Rules of Professional Conduct 1.8(e), 1.8 cmt. 6, 1.13(c), 5.4(c) (permitting third-party payment for legal services, absent conflict of interest or interference with lawyer's independent professional judgment).[19] The courts below correctly eschewed an interpretation of the federal witness tampering, bribery, and obstruction of justice statutes that would condemn this commonplace and salutary practice.[20]

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duties taken in good faith); *see also* 18B Am. Jur. 2d *Corporations* §§ 1900, 1902; D.C. Code Ann. § 29-304(16) (acknowledging power of corporation to indemnify officers and directors); Fla. Stat. § 607.0850(3) (2000) (requiring indemnification of employees); *Gaines v. Walker*, 986 F.2d 1438, 1443 (D.C. Cir. 1993) (recognizing implied duty to indemnify); *McLean v. International Harvester Co.*, 817 F.2d 1214, 1221-23 (5th Cir. 1987) (requiring Delaware company to indemnify former employee who successfully defended employment-related litigation).

19. "A corporation may hire and pay the fees of a lawyer to represent corporate constituents [*e.g.*, employees] so long as there is no interference with, or diminution of, the lawyer's obligations to his constituent client." D.C. Bar Ethics Op. 269.

20. *Cf. United States v. Ramsey*, 165 F.3d 980, 985 (D.C. Cir. 1999) (rejecting claim that prosecutors violated § 201(c)(2) when they promised leniency to a criminal defendant in return for truthful testimony; "such an interpretation of section 201(c)(2) would end a centuries-old practice"; "a *sub silentio* change of this magnitude to the well-established prosecutorial practice . . . would be . . . unprecedented. Such a change ignores the rule of statutory construction that '[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended

(Cont'd)

Second, the courts below correctly concluded that — beyond the *per se* rule petitioner urged, condemning *any* reimbursement by employers — petitioner had failed to plead "a short and plain statement" of the facts that might entitle her to relief. Fed. R. Civ. P. 8(a)(1). The statutes on which petitioner relies proscribe certain behaviors if done "corruptly." Pet. App. A19, A23, A24. The term

> "corruptly" . . . means "depraved, evil: perverted into a state of moral weakness or wickedness . . . of debased political morality: characterized by bribery, the selling of political favors, or other improper political or legal transactions or arrangements. . . ." A "corrupt" intent may also be defined as "the intent to obtain an improper advantage for oneself or someone else, inconsistent with official duty and the rights of others."

United States v. North, 910 F.2d 843, 881-82 (D.C. Cir. 1990) (quoting Ballentine's Law Dictionary 276 (3d ed. 1969)).

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such a change' ") (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989)), *cert. denied*, 120 S. Ct. 223 (1999); *United States v. Singleton*, 165 F.3d 1297, 1299 (10th Cir.) (*en banc*) (holding that criminalizing a plea agreement under § 201(c)(2) "would not only be a radical departure from the ingrained legal culture of our criminal justice system but would also result in criminalizing historic practice and established law"), *cert. denied*, 527 U.S. 1024 (1999). In *Ramsey* and *Singleton*, the U.S. Attorney entered into explicit agreements conditioning leniency in sentencing on favorable testimony. No *quid pro quo* even remotely similar is alleged in this case.

The complaint contained few suggestions of behavior petitioner might claim to be corrupt, and the ones she did include were manifestly insufficient. For example, petitioner complained that in a few instances, counsel for the deponents instructed their clients not to answer questions petitioner asked about privileged conversations between the deponent and counsel, and to refrain from divulging the names of certain individual Skadden, Arps attorneys who had experienced prior performance difficulties. *See, e.g.*, Pet. App. A51, A58.[21] Petitioner also alleged that respondents "delay[ed]" depositions, *See, e.g.*, Pet. App. A46, but the Amended Complaint lacks any *factual* allegations from which one might conclude that this was done corruptly. Apparently, petitioner believes that respondents engaged in "racketeering" activity when their counsel rescheduled depositions to accommodate the schedules of all concerned. The courts below correctly determined that an attorney does not, as a matter of law, act "corruptly" when she attempts to reschedule a deposition, objects to inquiries into privileged matters, or designates documents as confidential.

Finally, petitioner did not allege — and could not truthfully allege — a causal relationship between the reimbursement offer and the "influence" she decries, *i.e.*, that the offer of cost-free legal services was, in any respect, contingent on the testimony

21. Tellingly, petitioner does not, and could not, quibble with the merits of the objections themselves. Petitioner never sought to compel answers to her questions regarding privileged conversations, and the Superior Court sustained the objections regarding the confidential personnel data. Thus, rather than "corruptly" seeking to "influence" the testimony of witnesses (as petitioner alleged), counsel merely protected the legitimate interests of their clients, and the clients merely followed the advice of counsel. The "legitimate acts of attorneys on behalf of clients cannot form the basis of a RICO claim." *Morin v. Trupin*, 711 F. Supp. 97, 105-06 (S.D.N.Y. 1989).

the witnesses were about to give. This Court has held explicitly that this sort of *quid pro quo* relationship is the *sine qua non* of bribery under § 201(b). *See United States v. Sun-Diamond Growers*, 526 U.S. 398 (1999). Because there is no suggestion — in the Amended Complaint or in this case — of such a *quid pro quo* arrangement, dismissal was entirely warranted.

III. THE DISTRICT JUDGE ENGAGED IN NO CONDUCT WARRANTING RECUSAL

Petitioner suggests that certiorari is warranted to review the district judge's failure to recuse herself following a telephone call to her chambers by respondents' counsel. Again, petitioner posits no recurring question of federal law she seeks to have answered, no split of authority on any substantive legal standard, and no compelling reasons for review.

Petitioner does, however, suggest that the courts below erred in failing to treat the alleged recusal question in this case like the one in *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995). Petitioner's reliance on *Microsoft* is telling. In that case, the D.C. Circuit ordered a matter reassigned on remand because: (a) when the district judge determined that a consent decree proposed by the Department of Justice and the defendant was inadequate, the judge did so, in part, on the basis of allegations made about the defendant's business practices in a book he had read; (b) the district judge had allowed third party companies to argue against the proposed consent decree while remaining anonymous, both to the public and to the defendant; and (c) the district judge accepted for filing extensive *ex parte* memoranda and materials going directly to the merits of the controversy from these anonymous entities.

In this case, by contrast, respondents' counsel made a telephone call to the law clerk in the district judge's chambers (not to the judge) to inquire about a purely administrative matter (not the merits) — *i.e.*, whether an order might be expected regarding its request for a stay before the time ran for filing a response to petitioner's 400-page submission in support of her motion for partial summary judgment. No statute, rule, or ethical consideration is violated by a call from counsel to a judge's law clerk to determine the procedural status of a motion before the court.[22]

In *Williams v. Phillips Petroleum Co.*, 23 F.3d 930 (5th Cir.), *cert. denied*, 513 U.S. 1019 (1994), for example, the plaintiff argued that the defendant's counsel, *inter alia*, had "engaged in improper *ex parte* communications with the district judge['s] . . . law clerks." *Id.* at 938. The plaintiff's accusation was based on billing records submitted in the district court by defendant's counsel. The records, however, disclosed only that defendant's counsel had spoken on a few occasions with the judge's case manager and his law clerk "re: status," "re: hearing requested," "re: discovery conference," and "re: resolution on motions." *Id.* at 938-40.[23] From these entries, the Fifth Circuit determined that "[t]he record [was] singularly devoid of evidence that the contacts were improper." *Id.* at 938.

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22. Petitioner makes much of the alleged fact that she did not receive the affidavit filed in support of respondents' fee petition until a much later date. According to respondents' records, however, the affidavit was served by hand to petitioner's last known address.

23. Petitioner intimates that the Fifth Circuit concluded that the contacts with the case manager were proper but that contacts with the law clerk were not. In fact, both types of contacts were at issue, and the court held that both were proper. *Williams*, 23 F.3d at 938.

Indeed, it held that

> [l]acking any evidence that the contacts were improper, the accusations of plaintiffs' counsel are scurrilous, frivolous, and contrary to the duties of an officer of the court. . . . Trying to sell this court on his conspiracy theories, he has attempted to put a veneer of impropriety on innocent contacts by quoting selectively from [counsel's] time sheets and even mischaracterizing the parties involved. We will not stand by idly and allow an attorney to waste the time of this court and maliciously denigrate the reputations of judges and other officers of the court.

Id. at 938-40; *see also LaChappelle v. City of El Cajon*, No. 97-55699, 1998 U.S. App. LEXIS 7931, at *2 (9th Cir. Apr. 22, 1998) ("discussion between . . . counsel and Judge Jones's law clerk regarding scheduling the summary judgment motion was not an improper ex parte communication").

This is but the latest in a series of baseless, vindictive lawsuits brought by petitioner to harass and sully the reputation of those with whom she disagrees. There was no misconduct by the district judge or by respondents or their counsel, and there are no issues in this case worthy of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

E. LAWRENCE BARCELLA, JR.
Counsel of Record
NEAL D. MOLLEN
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 508-9500

Attorney for Respondents Paul, Hastings, Janofsky & Walker LLP; Barbara Berish Brown; Ellen C. Rice; W. Glenn Merten; David Scott Nance; William F. Gould; Linda L. Rickman; John J. Burke; Thomas J. Casey; Tracey DeVaux; Abbey G. Hairston

JANET L. GOETZ
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, DC 20005
(202) 371-7000

Attorney for Respondents Skadden Arps, Slate, Meagher & Flom LLP; Thomas J. Schwarz; Antoinette Cook Bush; Henry P. Baer; Robert S. Lighthizer; John J. Mangan; Neal S. McCoy; Janet L. Goetz; Richard L. Brusca; Richard A. Hindman; Ellen Lyons

FRANK C. MORRIS, JR.
EPSTEIN, BECKER & GREEN, P.C.,
1227 25th Street, N.W., Suite 700
Washington, DC 20037
(202) 861-0900

Attorney for Respondents
Epstein, Becker & Green, P.C.;
Abbey G. Hairston

WILLIAM L. GARDNER
MORGAN, LEWIS & BOCKIUS, LLP
1800 M Street, N.W.
Washington, DC 20036
(202) 467-7000

Attorney for Respondents
Morgan, Lewis & Bockius, LLP;
Alicia L. Batts; Grace E. Speights

JAMES L. QUARLES, III
HALE AND DORR LLP
1455 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 942-8400

Attorney for Respondent
Simone Wu